

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

TOMMY R. BEWLEY,)	
)	
Petitioner,)	
)	
v.)	No. 4:05 CV 1778 CDP
)	DDN
)	
DAVE DORMIRE,)	
)	
Respondent.)	

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

This action is before the court upon the second amended petition of Missouri state prisoner Tommy R. Bewley for a writ of habeas corpus under 28 U.S.C. § 2254. This matter was referred to the undersigned United States Magistrate Judge for review and a recommended disposition in accordance with 28 U.S.C. § 636(b). For the reasons set forth below, the undersigned recommends denying habeas relief.

BACKGROUND

On February 1, 2001, following a non-jury trial in the Circuit Court of Mississippi County, Missouri, petitioner Tommy Bewley was convicted of two counts of first degree sexual misconduct (Counts 1 and 2), one count of first degree child molestation (Count 3), two counts of first degree endangering the welfare of a child (Counts 4 and 7), two counts of first degree statutory sodomy (Counts 5 and 6), one count of first degree statutory rape (Count 8), one count of second degree statutory rape (Count 9), and one count of second degree statutory sodomy (Count 10). For these convictions, petitioner received substantial sentences of imprisonment. (Doc. 8, Ex. B at 6, 88-96.)

The opinion of the Missouri Court of Appeals recounts the following facts that are indicated by the trial evidence that supports the trial court's guilty verdicts:

The record reveals several incidents of sexual abuse that appear to be unrelated, save for the fact that all the incidents involved [petitioner]. In regard to the first incident, on November 5, 1997, fourteen-year-old C.H. ran away from the Missouri Children's Baptist Home in East

Prairie, Missouri.FN2 As C.H. was walking down the road, a van driven by [petitioner] approached her, stopped, and offered her a ride, which she accepted. [Petitioner] drove C.H. to his house and, after speaking with his wife ("Dee"), invited C.H. into their home.

FN2. We use initials of all the victims in this case to protect their identity.

Once inside, [petitioner] and Dee offered C.H. some beer and what C.H. believed was marijuana. After drinking and smoking with [petitioner] and Dee, C.H. began to feel ill. [Petitioner] and Dee directed C.H. into their bedroom. Once there, Dee began kissing C.H. on her mouth and breasts while [petitioner] touched her breasts and vagina. [Petitioner] then had sexual intercourse with C.H. until she asked him to stop. At that point, C.H. went out and slept on the couch.

The next morning, C.H. accompanied [petitioner] and Dee to work and helped them in their dry-wall business throughout the day. C.H. returned home with [petitioner] and Dee that evening and they again drank beer and smoked what C.H. described as marijuana. C.H. eventually passed out and awoke the next morning to find her pants undone. [Petitioner] and Dee took C.H. to East Prairie and dropped her off at the Dollar General Store. C.H. walked over to the police station and advised them that she had run away. She was returned to the Missouri Children's Baptist Home.

Soon after returning, C.H. informed the director of the Baptist Home what [petitioner] and Dee had done to her the previous two evenings. The director notified police authorities and took C.H. to the hospital for an examination.

Regarding the other incidents, Judy Douglas ("Ms.Douglas"), an employee with the Division of Family Services ("D.F.S."), received a report on September 14, 1999, concerning other incidents of sexual abuse implicating [petitioner]. The information revealed that [petitioner] and Dee were "respite providers" for two young children, E.T, a young girl under the age of twelve, and A.T., a young boy under the age of ten.FN3 Ms. Douglas spoke with E.T. on September 29, 1999, and E.T. informed her that [petitioner] and Dee had been touching her "[e]verywhere" and that this had occurred "lots of times." E.T. also related to Ms. Douglas that she and her younger brother, A.T., had "do[ne] it" while [petitioner] and Dee watched, and that "[petitioner] and Dee [did] it and me and [A.T.] watch[ed]." FN4 E.T. further related to Ms. Douglas that [petitioner] was "doing it to [A.D.], and her mom and dad don't know it." FN5

FN3. According to the testimony of Ms. Douglas at trial, "respite providers" are persons paid by the Department of

Mental Health "to take care of mentally-challenged children, to give the parent [of these children] an opportunity to have a break...." The record shows that E.T. and A.T. were both mentally challenged.

FN4. After [petitioner] was subsequently charged, E.T. testified at his trial that [petitioner] had sexual intercourse with her by placing his penis "inside" her.

FN5. A.D. was another young girl under the age of twelve, and a friend of E.T.

On December 6, 1999, Ms. Douglas interviewed another minor, A.D., who was eight years old at the time, to follow up E.T.'s remark that [petitioner] had possibly molested A.D. Ms. Douglas coordinated the interview of A.D. with Deputy Roy Moore ("Deputy Moore") of the Mississippi County Sheriff's Department. A.D. informed Ms. Douglas and Deputy Moore that [petitioner] had "touched her" and when asked where he had touched her, "[s]he simply pointed to her chest area and between her legs...." A.D. was able to recall two specific dates when [petitioner] had touched her as she had recorded the first incident in her diary and could recall that [petitioner] had touched her two days prior to her interview, December 4, 1999. When asked if she had seen [petitioner] touch any other children, A.D. responded that she had seen [petitioner] touching E.T. A.D. also reported that [petitioner] had showed her movies where the people "all got in a bed together and they were touching each other" and that [petitioner] "had magazines there that had naked people in them."

In response to a request by Mississippi County authorities, on December 7, 1999, Karen Henry of the Polk County D.F.S. conducted an interview of A.T., who was then staying in community alternative housing in Bolivar, Missouri. Also, on January 13, 2000, Kathy Carr, a child forensic interviewer for the Child Advocacy Center, conducted an interview of A.T. During both of these interviews, A.T. confirmed that [petitioner] and Dee had forced him to watch the two having sex. A.T. further related that [petitioner] had forced him to engage in sexual relations with E.T. and forced him to kiss and lick the private parts of both [petitioner] and Dee. He also related that [petitioner] had put his penis in A.T.'s "butt." A.T. stated that when [petitioner] had A.T. kiss [petitioner]'s penis that "white stuff" would come out. A.T. further recounted that [petitioner] threatened to kill A.T. if he refused to do these things or ever told anyone.

Based on the information he had gathered, Deputy Moore applied for and received an arrest warrant for [petitioner] and a search warrant for the home of [petitioner]. Deputy Moore executed each of the warrants and seized various items

from [petitioner]'s residence, including several pornographic videos and a pistol. [Petitioner] was charged with the aforementioned counts involving his activities with C.H., E.T., A.T., and A.D. He was tried before the trial court and was found guilty on all counts charged.

In his first point, [petitioner] alleges the trial court erred in overruling his motion for acquittal on the count of statutory rape in the second degree involving C.H. because the State failed to present sufficient evidence that [petitioner] "inserted his penis" into C.H.'s vagina. [Petitioner] avers that C.H. was not able to testify affirmatively that [petitioner] inserted his penis into her. Further, [petitioner] contends that C.H. was not a credible witness due to her intoxication at the time of the event and her testimony was not supported by physical evidence presented at trial.FN6

FN6. At trial, [petitioner] offered into evidence a copy of C.H.'s physical exam taken on November 7, 1997, just after C.H. reported the incident with [petitioner] and Dee. Results of the pelvic examination of C.H. found her external genitalia to be normal and no injuries were discovered.

* * *

At trial, C.H. testified that "[Petitioner] had sexual intercourse with me." When asked by the State what she meant by sexual intercourse, C.H. responded, "[w]here they put their penis in my vagina." While C.H. did testify that she did not ever see [petitioner]'s penis, when asked on cross-examination how she knew that [petitioner] had put his penis inside her, C.H. replied, "[b]ecause I felt it go in." Further, C.H. related that she had knowledge and experience regarding sexual intercourse as she testified that previously another person had forced her to engage in sexual intercourse.

State v. Bewley, 68 S.W.3d 613, 615-17 (Mo. App. 2002).

PETITIONER'S GROUNDS FOR HABEAS CORPUS RELIEF

In his second amended petition Bewley alleges eight grounds for federal habeas corpus relief:

- (1) Petitioner received constitutionally ineffective assistance of counsel and was deprived of due process of law when defense counsel failed to offer into evidence a physical examination of the victim, conducted by Dr. Claudia Preuschoff, which was conducted after the one offered into evidence by the state and which contradicted the state's evidence.

- (2) Petitioner received constitutionally ineffective assistance of counsel and was deprived of due process of law when defense counsel failed to investigate and require petitioner to be tested for trichomoniasis, a sexually transmitted disease, spread through intercourse, which petitioner alleges he did not have but which appeared in the victim.
- (3) Petitioner received constitutionally ineffective assistance of counsel and was deprived of due process of law when defense counsel failed to call five witnesses who would have testified in his favor.
- (4) Petitioner was the victim of prosecutorial misconduct when the prosecutor "knowingly endorsed and presented witnesses who were unable to distinguish between reality and fantasy; one coerced to lie for altruistic reasons, and another willing to lie for self-serving reasons."
- (5) Petitioner was the victim of selective prosecution due to his local residence and status as a prior sex offender.
- (6) Petitioner was the victim of a "miscarriage of justice" because the trial court judge was biased against him.
- (7) Petitioner was denied adequate time and funds to properly try his case in comparison to the prosecutor's resources.
- (8) Petitioner is actually innocent, as a result of grounds 1 through 7.

PROCEDURAL HISTORY

Petitioner's 2001 conviction and sentences were affirmed on direct appeal. State v. Bewley, 68 S.W.3d 613 (Mo. App. 2002). The denial of petitioner's motion for post-conviction relief under Missouri Supreme Court Rule 29.15 was affirmed on appeal. Bewley v. State, 151 S.W.3d 151 (Mo. App. 2004).

Petitioner commenced this federal habeas action in 2005. On December 19, 2005, he moved for the court to stay the progress of his habeas action, so that he could exhaust his available state court remedies. (Doc. 12.)

On December 28, 2005, the court denied the motion for a stay without prejudice; petitioner could refile the motion after he commenced further proceedings in the state courts. (Doc. 13.) Also on December 28, 2005, petitioner filed a first amended habeas petition. (Doc. 14.) On January 20, 2006, petitioner filed a second motion to stay this case,

stating he had filed a motion to reopen his post-conviction relief proceedings. (Doc. 16.) On January 24, 2006, the court granted the motion to stay, limiting the stay to a period of 60 days. (Doc. 17.) On March 23, 2006, petitioner moved for leave to file his second amended petition, which motion was sustained on March 27, 2006. Also on March 27, 2006, the court vacated the stay of this action. (Docs. 22, 23.)

PROCEDURAL ANALYSIS

To qualify for federal habeas corpus consideration under § 2254, a state prisoner must have first fully exhausted all available state remedies for each ground he presents in federal court. See 28 U.S.C. § 2254 (b) and (c); Coleman v. Thompson, 501 U.S. 722, 731 (1991); Sloan v. Delo, 54 F.3d 1371, 1381 (8th Cir. 1995). A state prisoner is deemed to have exhausted his available state remedies if he has fairly presented his claims to the state courts or he no longer has any state court procedure available to him. Duvall v. Purkett, 15 F.3d 745, 746 (8th Cir. 1994).

Nevertheless, under the doctrine of procedural bar, generally, a federal habeas court will not review a claim or ground for relief that the state trial and appellate courts did not have a reasonable opportunity to address. Sweet v. Delo, 125 F.3d 1144, 1149-1151 (8th Cir. 1997). A claim is procedurally defaulted and barred from federal habeas review when the petitioner fails to follow applicable state procedural rules in raising the claim. Id. The doctrine applies whether the procedural default occurred at trial, on appeal, or on state collateral attack. See Murray v. Carrier, 477 U.S. 478, 490-92 (1986).

However, a federal habeas court may reach the merits of a procedurally barred claim if the petitioner can show (1) legally sufficient cause for the default and actual prejudice resulting from the default, or (2) actual innocence, resulting in a fundamental miscarriage of justice. Regan v. Norris, 279 F.3d 651, 656 (8th Cir. 2002). Legally sufficient cause for a procedural default must be based upon an objective factor that is not identified with the petitioner, which impeded petitioner or his counsel from complying with the state's

procedural rule. Coleman, 501 U.S. at 750-53. If a petitioner claims actual innocence, he must support his allegations with new and reliable evidence. Schlup v. Delo, 513 U.S. 298, 324 (1995); Amrine v. Bowersox, 238 F.3d 1023, 1028-29 (8th. Cir. 2001).

Ground 1

In his federal Ground 1, petitioner alleges he received constitutionally ineffective assistance of counsel when his trial counsel failed to offer into evidence at trial medical opinion evidence contrary to the state's. Respondent argues that petitioner is procedurally barred from asserting Ground 1 because it is factually different from his state court ground for relief. In order to properly exhaust his remedies for habeas relief, a state prisoner must "fairly present" to the state courts the same factual and legal bases for the respective, asserted federal habeas corpus claim. Humphrey v. Cady, 405 U.S. 504, 516 (1972).

In his amended post-conviction relief motion in the state circuit court, petitioner alleged that his counsel "unreasonably failed to call Dr. Claudia Preuschoff to testify at [petitioner's] trial." (Doc. 8, Ex. G at 26.) In support of this ground for relief petitioner alleged that, had Dr. Preuschoff been called to testify, she would have testified from her examination of the victim that "there did not appear to have been any vaginal penetration of [the victim]." (Id. at 28.) Respondent argues that the federal ground alleges differently that Dr. Preuschoff would have testified "in a manner that would dispel the appearance that the damage to [the victim's] sphincter was actually damage to [the victim's] genitalia." (Doc. 33 at 8.)

The denial of post-conviction relief on Ground 1 was raised in Point 1 on direct appeal, stating that Dr. Preuschoff "would have testified that her examination of [the victim] showed no evidence of vaginal penetration." (Id. Ex. H at 21, 26.) This ground was ruled against petitioner on appeal. Bewley v. State, 151 S.W.3d at 154.

The undersigned disagrees with respondent on the procedural bar issue. Petitioner's Ground 1 invokes the testimony of Dr. Preuschoff at the post-conviction relief hearing and compares it to the state's

trial evidence to assert that Dr. Preuschoff's testimony might have contradicted the state's trial evidence regarding whether the victim's anal sphincter was damaged (as Dr. Preuschoff testified) or whether the victim's hymen was damaged (as the state's trial evidence indicated). While petitioner did not use the word "penetration" in his federal Ground 1, the undersigned sees a direct relationship between the Ground 1 allegations and the state court ground for relief which sought to impeach the state's evidence regarding penetration. The undersigned believes that the allegations of federal Ground 1 were fairly presented to the state courts in the post-conviction motion and were ruled by the state courts. Therefore, this court should consider the merits of Ground 1.

When considering the merits of a ground for habeas relief, relief may not be granted on a ground that has been decided on the merits in state court unless that adjudication:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. § 2254 (d) (1)-(2). "A state court's decision is contrary to clearly established law if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case." Tokar v. Bowersox, 198 F.3d 1039, 1045 (8th Cir. 1999) (quoting Richardson v. Bowersox, 188 F.3d 973, 977-78 (8th Cir. 1999)). The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000) (plurality opinion). A state court's factual findings are presumed to be correct. 28 U.S.C. § 2254(e)(1); Whitehead v. Dormire, 340 F.3d 532, 536 (8th Cir. 2003). Clear and convincing evidence that state court factual findings lack evidentiary support is required to grant habeas relief.

Id.

Ground 1 alleges that petitioner received ineffective assistance of trial counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court defined ineffective assistance of counsel under the Sixth and Fourteenth Amendments. The Strickland test requires federal habeas corpus relief if it is shown that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

There are two elements to a claim of ineffective assistance of counsel. A habeas petitioner must first demonstrate that counsel's performance fell below an objective standard of reasonableness. Id. at 687-88. In this regard, petitioner must overcome a strong presumption that counsel rendered constitutionally effective assistance. Id. at 689; Blackmon v. White, 825 F.2d 1263, 1265 (8th Cir. 1987). Counsel's strategic choices made after thorough investigation are virtually unchallengeable, and decisions following less thorough, but nevertheless reasonable, investigation are to be upheld to the extent that they are supported by reasonable judgment. Strickland, 466 U.S. at 690-91.

The second element of the Strickland test requires that a habeas petitioner demonstrate prejudice resulting from counsel's dereliction of duty. Id. at 687. The habeas petitioner must establish that counsel's deficient performance rendered the outcome of the proceeding unreliable or fundamentally unfair. Strickland, 466 U.S. at 687; Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993). The asserted prejudice must not be simply a "possibility" but an "actual and substantial disadvantage, infecting [petitioner's] entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982).

Petitioner alleges his trial counsel failed to offer the testimony of Dr. Preuschoff to the effect that she found the victim's sphincter muscle was damaged, whereas the state's witness testified that it was the victim's hymen that was damaged. The Missouri circuit court ruled this ground against petitioner:

After review of Dr. Preuschoff's testimony at the [post-conviction motion] hearing, the Court finds her testimony

would have been detrimental to the defense strategy. Dr. Preuschoff testified she rarely finds physical signs of vaginal penetration in similar cases. She further testified that the tissue of the hymen heals quickly particularly when the child is more advanced in her stage of puberty. Dr. Prueschoff testified she determined [the victim] to be of advanced maturity under the Tanner stages of development. The Court finds this testimony would have actually damaged the movant's defense and finds the movant was not prejudiced by his attorney's decision to not call Dr. Prueschoff.

(Doc. 8, Ex. G at 48.) When it reviewed this decision, the Missouri Court of Appeals denied relief stating:

We agree with the motion court and Movant's trial counsel that Dr. Preuschoff's testimony would not have aided Movant's defense in any substantial way because it would have been evidence that it is not unusual for a young girl of E.T.'s age and maturity to show no physical evidence of vaginal penetration even where penetration had occurred. "When defense counsel believes a witness' testimony would not unequivocally support his client's position, it is a matter of trial strategy not to call him, and the failure to call such witness does not constitute ineffective assistance of counsel." Winfield v. State, 93 S.W.3d 732, 739 (Mo. banc 2002). The motion court did not clearly err in denying post-conviction relief to Movant for his counsel's failure to call Dr. Preuschoff. Movant's first point is denied.

Bewley v. State, 151 S.W.3d at 154.

In support of Ground 1, petitioner argues that presenting the two assertedly conflicting bodies of testimony to the jury would have "questioned the accuracy of the prosecution's physical evidence and any possible motive this nurse listed on the DFS referral might have had for providing false information." (Doc. 22 Second Amended Petition at 3.) The state courts found and concluded that petitioner's trial counsel did not act unreasonably in not calling Dr. Preuschoff as a witness and, given the nature of her expected testimony, it was very unlikely that the outcome of petitioner's trial would have been different. Petitioner's speculative opinion about the utility of Dr. Preuschoff's testimony and the prejudice he suffered is an insufficient basis for avoiding the reasonableness of the state courts' findings and conclusions.

For these reasons, Ground 1 is without merit.

Ground 2

In Ground 2, petitioner alleges he received ineffective assistance of counsel because his trial counsel failed to investigate and require petitioner to be tested for Trichomoniasis, a sexually transmitted disease spread through intercourse, which petitioner alleges he did not suffer from but which appeared in the victim. Respondent argues that this ground is procedurally barred, because it was not raised in the appeal from the denial of post-conviction relief.

In his original, pro se motion for post-conviction relief filed June 10, 2002, petitioner alleged in Item 8(p) that he received ineffective assistance of counsel because counsel failed to present evidence that petitioner did not have, or been treated for, Trichomoniasis. (Doc. 8 Ex. G at 13.) He argued that this evidence would have proven a lack of penetration because this disease is communicable through sexual conduct and, whereas the victim had the disease, he did not. (Id. at 22-23.) On September 9, 2002, petitioner filed his amended motion which did not include the Item 9(p) ground for relief. (Id. Ex. G at 25-38.) During the circuit court hearing, Dr. Preuschoff testified that the victim had Trichomonas, a sexually transmitted disease. (Id. Ex. F at 6-7.) No evidence was adduced about whether petitioner had this disease or about the relevance of such information. (Id.) In his post-hearing judgment and opinion the circuit judge did not treat the aforesaid Item 9(p), but limited his decision to the allegations in the amended motion. (Id. at 39-53.) This ground was not presented to the Missouri Court of Appeals. (Id. Ex. H.) And that court did not treat it. Bewley v. State, 151 S.W.3d 151 (Mo. App. 2004).

The undersigned agrees with respondent that petitioner is procedurally barred from litigating Ground 2 because, even assuming petitioner properly presented the ground to the circuit court in his post-conviction relief motion, he did not raise it with the appellate court. Further, petitioner has asserted no cause at all, much less a legally sufficient cause, for this procedural default. (Doc. 10 Traverse at 1; Doc. 34 Second Traverse at 6-7.) And petitioner has not proffered any new and reliable evidence that he is actually innocent of

the crimes of which he is convicted.

Therefore, Ground 2 is procedurally barred from habeas corpus consideration.

Ground 3

In Ground 3, petitioner alleges he received ineffective assistance of counsel and was deprived of due process of law when his defense counsel (a) failed to call five witnesses, Delberta Taylor, Mike Hogan, Barbara J. Houk, M.D., the Mississippi County DFS-Service Unit investigator involved in the case, and Jeanette Taylor, who would have testified in his favor; and (b) failed to investigate and produce the psychological records of the victim and Jeanette Townsend for in camera review.

Respondent argues that Ground 3 is procedurally barred except for the failure of counsel to call Delberta Taylor as a witness. None of the specific allegations in Ground 3 were raised in petitioner's pro se motion for post-conviction relief. (Doc. 8 Ex. G at 11-24.) In his amended motion, petitioner alleged counsel's failure to call Delberta Taylor and Mike Hogan as witnesses for the defense. (Id. at 26-24.) During the post-conviction evidentiary hearing, the failure to call only Delberta Taylor was taken up. (Id. Ex. F at 31-32, 38-44.) In a written opinion, the circuit judge ruled against petitioner on the merits of the failure to call Delberta Taylor and noted that no evidence was adduced about Mike Hogan. (Id. Ex. G at 49.) On appeal petitioner raised only the failure to call Taylor. (Id. Ex. H at 21-22.) On direct appeal, the Missouri Court of Appeals ruled only the failure to call Delberta Taylor on its merits. Bewley v. State, 151 S.W.3d at 154.

Petitioner has failed to make a case for avoiding the procedural bar. He has stated no reason for his failure to fairly present his Ground 3 claims, other than the failure to call Delberta Taylor, to the circuit and appellate courts of Missouri. (See Doc. 10 Traverse at 1; Doc. 34 Second Traverse at 6-7.) And, again, he has offered no new and reliable evidence of innocence to establish that the court's failure to

consider the defaulted specifications of Ground 3 would be a miscarriage of justice. Therefore, on Ground 3, the court should consider the merits of only defense counsel's failure to call Delberta Taylor as a witness at trial.

In Ground 3, petitioner alleges that Delberta Taylor would have testified that, when the children were with their mother, A.T. and E.T. would cuss at, and become physically threatening towards their mother. She would have testified that, while in the custody of petitioner and his wife, the children were well behaved, respectful and obedient. (Doc. 22 Amended Petition at 5.) According to an investigator's report of an interview of Delberta Taylor dated November 17, 2000, and filed with the circuit court during the post-conviction relief motion proceedings, she knew the mother of two victims, as well as petitioner Bewley and his wife. Taylor claimed that the victims constantly caused disturbances and fought with their mother and were more obedient and well-behaved when in the presence of petitioner. (Doc. 8 Ex. G at 38.) Petitioner argues that Taylor's testimony would have persuaded the trial court that the victims were happier with him.

The circuit court determined that petitioner's defense counsel decided not to call Taylor as a witness out of reasonable trial strategy, which, upon review of the record and the testimony, did not result in prejudice to petitioner. (Id. at 49.) These findings and conclusions are supported by substantial evidence, the hearing testimony of defense counsel. She testified that before trial she knew from the investigator's report what Taylor would likely testify to and that to the best of her recollection Taylor's testimony would present no defense to the charges. (Id. Ex. F at 39-42.)

The Missouri Court of Appeals affirmed the circuit court's ruling, stating that it agreed with the circuit court "that the decision not to call Taylor was a matter of trial strategy and that [petitioner] was not prejudiced as a result." Bewley v. State, 151 S.W.3d at 155. The decisions of the Missouri courts on Ground 3 were reasonable and supported by the record. The record establishes that petitioner's failure to call Delberta Taylor as a defense witness was based upon reasonable trial strategy and that petitioner was not prejudiced by that

decision.

Ground 3 is without merit regarding counsel's failure to call Delberta Taylor as a defense witness. The rest of Ground 3 is procedurally barred.

Grounds 4, 5, 6, and 7

In Ground 4 petitioner alleges he was the victim of prosecutorial misconduct when the prosecutor "knowingly endorsed and presented witnesses who were unable to distinguish between reality and fantasy; one coerced to lie for altruistic reasons, and another willing to lie for self-serving reasons." These witnesses were victim E.T., victim A.T., Amber Duty, and Judy Douglas. (Doc. 22 at 7-9.) In Ground 5, petitioner alleges he was the victim of selective prosecution due to his local residence and status as a prior sex offender. In Ground 6, petitioner alleges he was the victim of a "miscarriage of justice" because the trial court judge was biased against him. In Ground 7, petitioner alleges he was denied adequate time and funds to properly try his case in comparison to the prosecutor's resources.

Respondent argues and the undersigned agrees that Grounds 4 through 7 are procedurally barred. Petitioner did not raise these claims in the appeal from his conviction. (Doc. 8 Ex. C.) Petitioner did not allege these claims in his original or amended motions for post-conviction relief in the circuit court. (Id. Ex. G at 3-36.) And he did not raise them on appeal from the denial of post-conviction relief. (Id. Ex. H.)

Petitioner has not asserted any legally sufficient cause for his failure to present Grounds 4 through 7 to the Missouri courts. And petitioner has not proffered any new and reliable evidence that he is actually innocent of the crimes of which he is convicted.

Therefore, Grounds 4 through 7 are procedurally barred.

Ground 8

In Ground 8, petitioner alleges he is actually innocent, as a result of grounds 1 through 7. Petitioner is not entitled to any relief on his claims of constitutional violations, and a claim of actual

innocence is not an independent basis for habeas corpus relief. Herrera v. Collins, 506 U.S. 390, 400 (1993); Clayton v. Roper, No. 06-3260, 2008 WL 268998, at *13 (8th Cir. Feb. 1, 2008) .

Ground 8 is without merit.

For these reasons,

IT IS HEREBY RECOMMENDED that the petition of Tommy Bewley for a writ of habeas corpus be denied.

The parties are advised they have ten (10) days to file written objections to this Report and Recommendation. The failure to file timely, written objections may result in a waiver of the right to appeal issues of fact.

/S/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on March 6, 2008.